Office Supreme Court, U.S.
FILED
JUN 1 1981
ALEXANDER L. STEVAS,
CLERK

80-2039

In The

# Supreme Court of the United States

October Term, 1980

LOUIS C. OSTRER AND SEYMOUR GREENFIELD,

*Petitioners,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BARRY M. FALLICK
ROCHMAN, PLATZER & FALLICK
*Attorneys for Petitioners*
230 Park Avenue
New York, New York 10169
(212) 697-4090

RICHARD H. WYNN
*Of Counsel*

3732 LUTZ APPELLATE PRINTERS, INC.
NY (212) 840-9494 • (516) 222-1606 • (914) 683-9363
NJ (201) 257-6850 • PA (215) 563-5587 • DC (202) 783-7288 • MA (617) 227-1133

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court should have aborted the trial when it learned during the early days of the trial that five jurors had just read a news article describing the petitioner Ostrer as "linked" to "the underworld" and as reluctant to divulge what he knew of underworld activities including "loansharking, extortion, and murder"?

2. Was the district court's limited inquiry of the jurors exposed to the prejudicial newspaper article in direct conflict with a standard previously approved by the Court of Appeals for the Second Circuit in *United States v. Persico,* 425 F. 2d 1375, 1378-82 (2d Cir.), *cert. denied,* 400 U.S. 869 (1970)?

## TABLE OF CONTENTS

*Page*

Questions Presented for Review ..... i

Table of Contents ..... ii

Table of Citations ..... ii

Opinions Below ..... 1

Jurisdiction ..... 1

Statement of the Case ..... 2

Reasons for Granting the Writ:

I. The questions presented are important questions of federal law which have not been, but should be settled by this Court. ..... 5

Conclusion ..... 18

## TABLE OF CITATIONS

**Cases Cited:**

Marshall v. United States, 360 U.S. 310 (1959) ..... 6, 8, 10

Murphy v. Florida, 421 U.S. 794 (1975) ..... 8

United States v. Concepcion Cueto, 515 F. 2d 160 (1st Cir. 1975) ..... 6, 9

*Contents*

*Page*

United States v. Desist, 384 F. 2d 889, aff'd on other grounds, 394 U.S. 244 (1967) ..... 7

United States v. Feldman, 299 F. 2d 914 (2d Cir. 1962) .. 5

United States v. Ostrer, et al., 481 F. Supp. 407 (S.D.N.Y. 1979) ..... 2, 12

United States v. Persico, 425 F. 2d 1375 (2d Cir.), cert. denied, 400 U.S. 869 (1970) ..... i, 5, 11, 12, 18

United States v. Williams, 568 F. 2d 464 (5th Cir. 1978) ..6, 8

**Statutes Cited:**

28 U.S.C. §1254(1) ..... 2

**APPENDIX**

Opinion of the United States Court of Appeals Dated February 18, 1981 ..... 1a

Order of the United States Court of Appeals Denying the Petition for Rehearing ..... 5a

No.

In The

# Supreme Court of the United States

October Term, 1980

LOUIS C. OSTRER AND SEYMOUR GREENFIELD,

*Petitioners,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

### OPINIONS BELOW

The opinion of the court of appeals was unpublished and appears in the Appendix hereto.

### JURISDICTION

The petitioners Louis C. Ostrer and Seymour Greenfield respectfully pray that a writ of certiorari issue to review a judgment and unpublished opinion of the United States Court of Appeals, for the Second Circuit entered in this proceeding on

February 18, 1981. A petition for rehearing was denied on April 2, 1981. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## STATEMENT OF THE CASE

On May 18, 1978, Louis Ostrer, Seymour Greenfield, Rita Ostrer and Cy Reeves Snyder were jointly indicted in the United States District Court for the Southern District of New York on charges of conspiracy to evade taxes and evasion of payment of taxes. In addition, petitioners Louis Ostrer and Seymour Greenfield were also charged with conspiracy to embezzle, embezzlement, interstate transportation of stolen properly and racketeering. These crimes arose out of transactions with the pension and welfare funds of Union Local 918.

On March 25, 1980, Rita Ostrer entered a plea of guilty to conspiracy to violate 7203 of Title 26 as a misdemeanor. She was sentenced to one years' imprisonment. Snyder's indictment was dismissed by the government prior to trial.

Louis Ostrer filed an omnibus pretrial motion, joined in by Greenfield. Included in the motion were various suppression motions, dismissal motions, severance motions and discovery motions. The district court denied the motions except that the motion to suppress the fruits of illegal searches and seizures and to hold a taint hearing was denied without prejudice to be renewed after the trial. *United States v. Ostrer, et al.*, 481 F. Supp. 407 (S.D.N.Y. 1979).

As the district ocurt below found, and the government did not deny, Ostrer's office had been unlawfully searched by the state prosecutor in 1973 and seized documents had been viewed by the federal prosecution staff. Thereafter, a dormant criminal investigation of Ostrer was revived and eventuated in the

prosecution at bar. Ostrer contended that at the very least, the impetus and direction of the government's efforts resulted directly from the illegal search and seizure and was fatally tainted thereby. In addition, Ostrer sought to show that the prior invasion had been exploited by the government for the acquisition of documentary evidence from secondary sources; that no summonses or subpoenas under these circumstances could purge or attenuate the taint. The factual hearing on these claims was held after the verdict and before sentence. After hearing government witnesses and refusing petitioners' requests to present witnesses, the court recessed with the instruction to counsel not to submit anything in writing to his chambers. He would, he said, indicate when or whether he would hear from the named witnesses that Ostrer stated he wished to call, all of whom had or may have had knowledge of the development of the government's case. The next word from the judge was an issuance of his order, accompanied by a twelve-page opinion, denying the motion in all respects.

On March 10, 1980, Ostrer, Greenfield and Rita Ostrer went to trial before Judge Duffy. During this six-week trial, the district court had to make rulings concerning during-trial publicity, dismissal of the "RICO" count, instructions to the jury concerning Ostrer's defense of agency, and the government's improper comments during its rebuttal closing argument.

At the trial, the government adduced evidence to demonstrate that Ostrer conspired to, and did, wilfully fail to pay $6.8 million in taxes for the years 1965 through 1975 as alleged. Ostrer filed tax returns for those years but failed to enclose payments for the balance due. As his returns indicate, Ostrer himself calculated the tax he owed for the eleven tax years 1965-75 as more than $2,000,000. The figure underlying the government's case was derived as follows: The decisions of the tax court to which the petitioner stipulated determined that

his civil tax liability for three of those years (1965-67) was a total of nearly $2,200,000 more than was reflected on the returns for those years. The addition of interest and various late filing fees, negligence, and civil fraud penalties to this $4,200,000 figure brings the total tax owed by Ostrer to the $6,800,000 amount described in the indictment. The government neither charged nor proved that Ostrer had failed to file returns or had understated his federal tax liability. Rather, the government sought to establish criminal liability under a seldom invoked provision of law for willfully failing to pay taxes owed. As a result, a good deal of the record is taken up with the tangled financial accounts of Ostrer. By the introduction of this evidence, the government sought to show that Ostrer had falsely represented his inability to satisfy his tax debt by the purposeful and deceitful dispersion of his assets.

As part of his defense, Louis Ostrer, denied that his failure to pay this tax liability was willful. As support for this claim he testified that he could not make payments to the government because of his enormous monetary commitments to other persons. In addition, Ostrer attempted to show that he was trying to settle his tax liabilities through negotiations with the government in the tax court. Greenfield, as part of his defense, attempted to show a lack of intent on his part.

Moreover, the government also introduced evidence concerning the petitioners' alleged embezzlement of $1,232,000 from the pension and welfare funds of Local 918 in 1976. The union had in 1976 purchased twenty-six annuity contracts from Foundation Life Insurance Company. This plan to purchase the annuity contracts was solicited by and presented to the union by the petitioner. Evidence was introduced demonstrating that Ostrer, after having received payment from the union, as agent for Foundation Life, forwarded $770,000 to Foundation Life Insurance Company for ten of the annuity contracts. The

remaining $1.2 million was deposited by Ostrer in a bank account in the name of Sales Administrators for Employee Fringe Advantages, Inc. Thereafter, the money in this account was used by Ostrer.

Louis Ostrer's defense on these charges was based on a claim that he was an agent for Foundation Life Insurance Company and that the $1.2 million kept by him was part of his agent's balance. Accordingly, the relationship among the union, the insurance company, and Ostrer was explored at length, as well as the custom regarding the negotiation of such contracts and the fee or commission accorded to the "agent."

As a result of their conviction, Louis Ostrer was sentenced to a term of twenty years imprisonment and a fine of $70,000 plus the costs of the prosecution. Seymour Greenfield was sentenced to a term of three years imprisonment and a fine of $10,000.

## REASONS FOR GRANTING THE WRIT

### I.

**The questions presented are important questions of federal law which have not been, but should be settled by this Court.**

The crux of the issue presented herein is whether the statements contained in a newspaper article were so prejudicial as to require the district court to empanel a new jury. *United States v. Feldman,* 299 F. 2d 914, 917 (2d Cir. 1962). In addition, a second issue raised concerns the extent of the district court's voir dire of jurors exposed to the prejudicial newspaper article. The Second Circuit's opinion concerning this issue is in conflict with a previous decision of the court. *Compare United States v. Persico,* 425 F.2d 1378-82 (2d Cir.), *cert. denied,* 400 U.S. 869 (1970).

In this case the newspaper article centered upon the petitioners[1] and referred to their "alleged" knowledge of prior illicit conduct involving crimes of the most heinous nature and to their connection to the "underworld". Thus, they assert that the contents of the newspaper article measure up to the degree of prejudice which resulted in reversals in *Marshall v. United States,* 360 U.S. 310 (1959) and *United States v. Williams,* 568 F. 2d 464, 468 (5th Cir. 1978). Moreover, in the circumstances of this case, the inherently prejudicial impact of the article cannot be nullified by any voir dire, jurors' assurances, or corrective instructions. *United States v. Williams, supra; United States v. Concepcion Cueto,* 515 F. 2d 160, 163-164 (1st Cir. 1975).

On March 14, 1980, after one day of testimony, the government notified the court out of the presence of the jury (who were not sitting) that on that day there appeared an article in the New York Post concerning the petitioners. The story bore a banner headline that read: "The Man Who Owes $7 Million in Taxes".

The story under the headline began as follows:

> "An insurance consultant with alleged links to the underworld has been accused of owing the government $6.8 million in back taxes."

The story went on to report about the government's and petitioner Ostrer's opening statements. The next-to-last paragraph of the article again emphasized Ostrer's ties to the "underworld" and his knowledge of nefarious activities:

---

1. Although the newspaper article centers on Ostrer, it describes Greenfield as a "close associate". Thus, the jury's appraisal of Greenfield's defense would have been affected by the prejudicial impact of the article and his close association with Ostrer.

> "In 1973 the Manhattan District Attorney's office sought to force Ostrer to testify before a special grand jury about information he had about alleged organized crime, loansharking, extortion and murder."

Thereafter, on March 17, 1980, the district court inquired into the jury's exposure to this prejudicial publicity. In the course of the inquiry, five of the jurors indicated that they had read the news account (T158).[2] After interviewing the jurors, however, the district court denied a motion for a mistrial apparently relying on the jurors' assurances that their exposure to the article would have no effect on their attitude toward the petitioners. Furthermore, while it is true that portions of the article dealt with matters that were emphasized during the opening statements, the net effect of the article concluded that Ostrer was a part of "organized crime" and was involved in "murder, extortion and loansharking".

It is obvious that few items of intelligence concerning a defendant on trial are more inflammatory and potentially dangerous than the report that he is associated with the "underworld". *Cf., United States v. Desist,* 384 F. 2d 889, *aff'd on other grounds,* 394 U.S. 244 (1967) ("identification by a governmental employee of a defendant in the midst of a criminal trial as "an underworld figure" is an incident [not] to be taken lightly, if it occurred.") Add to that the reported belief of an official agency that the defendant has been privy to such activities as "murder, loansharking and extortion", and even the most resolutely impartial fact finder must be corrupted to some degree by ineradicable prejudice. In their effect both upon the merits of the case on trial, and upon the defendant's credibility

---

2. Jurors No. 4, 8, 9 and Alternates No. 1 and 3 (T158). Alternate Juror No. 1 eventually became a deliberating juror (T1471).

as a witness, such recitals as these are extremely harmful. They are the more insidious by reason of their vague and illusory terms. "Allegations" such as those in this article can never be absolutely refuted and do not lend themselves to impartial evaluation. *Marshall v. United States, supra.*

In *Marshall v. United States,* 260 U.S. 310 (1959), this Court in the exercise of its supervisory powers, reversed a federal conviction because of during-trial publicity. In *Marshall, supra,* the defendant was convicted of dispensing drugs without a prescription. During the trial, seven jurors were exposed to newspaper articles reporting that the defendant had previously been convicted of forgery, that he and his wife had been arrested for narcotics offenses, and that he had practiced medicine without a license. This information had been held inadmissible by the trial court. The seven jurors stated that they would not be influenced by the news accounts, and the judge refused to grant a mistrial. This Court reversed in a brief per curiam opinion, and some 16 years later stated that the principle behind *Marshall,* applicable only in the federal court, is that "persons who have learned from news sources of a defendant's prior criminal record are presumed to be prejudiced". *Murphy v. Florida,* 421 U.S. 794, 798 (1975).

The First and Fifth Circuit Court of Appeals have also addressed themselves to this issue. In *United States v. Williams,* 568 F. 2d 464, 468 (5th Cir. 1978), the Fifth Circuit Court of Appeals indicated that publicity during trial provides a greater opportunity for prejudice than does pretrial publicity and that a stricter standard is therefore demanded in determining whether a fair trial has been precluded. Applying this stricter standard, that court reversed a conviction in a second trial because the jurors had been exposed to news reports that told of the defendant's conviction in the first trial.

In *Concepcion Cueto, supra,* the court of appeals summarized the contents of the news article:

> "The news article, styled as a report on appellant's trial, recited that appellant was considered by federal authorities 'as one of the most important and most dangerous drug traffickers in Puerto Rico, Miami and the Caribbean,' and that it could be determined from the purity of the substances obtained by the informant that appellant was 'a "very fat fish" for the federal agents.' It reported that appellant had fled from two previous attempts to arrest him, on the second occasion engaging in a 'shoot-out' with authorities for which he was also charged. The story also stated that appellant was presently detained at a local jail because unable to post the $200,000 bail set for him."

Thereafter, the court of appeals discussed the prejudicial nature of the article and the need to discount assurances by the jurors of their impartiality:

> "Each of these items possessed capacity for prejudice. Appellant had taken the stand and had been subjected to an intensive cross-examination hinting both that he was no stranger to courts and that he was living well beyond the means afforded by his purported occupation as a farmer. His subsequent portrayal in the article as a leading drug trafficker, a 'fat fish', and an armed desperado who had engaged in an escape and a shoot-out with police, put the finishing touches on a characterization fitting neatly with the criminal conduct of which he was charged. . . .

> In the circumstances we do not think the jurors' assurances of continued impartiality nullified appellant's claim of prejudice. Had the potential harm been less clear, the individual assurances might have been very useful in assessing actual impact. Cf. ABA Standards Relating to Fair Trial and Free Press §§3.4(b), 315(f) (Approved Draft 1968). But a juror's impressions, however honest, cannot be dispositive where the improper information is as damning and material as this. (See id., Commentary at 56-66; *Silverthorne v. United States,* 400 F.2d 627, 639 (9th Cir. 1968), cert. denied, 400 U.S. 1002, 91 S. Ct. 585, 27 L. Ed. 2d 633 (1971): cf. *Irvin v. Dowd,* 366 U.S. 717, 727-28, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961). A criminal defendant's guilt is not to be determined from inadmissible evidence. Here the content and timing of the material went beyond anything we feel able to assume the average juror could withstand. It also went beyond anything the defendant should be forced to accept. *Marshall v. United States,* 360 U.S. 310, 79 S. Ct. 1171, 3 L. Ed. 2d 1250 (1959)."

In sum, this Court should decide whether a newspaper article published during the trial that reveals to the jurors that petitioners have "alleged ties to the underworld, loansharking, extortion and murder" is inherently prejudicial, *Marshall v. United States, supra.*

In addition, petitioners also assert that, *assuming arguendo,* that the contents of the newspaper article did not measure up to the degree of prejudice which resulted in a reversal in *Marshall v. United States, supra,* the district court's inquiry of the jurors

was not prompt and searching, and in direct conflict with a standard previously approved by the Second Circuit in *United States v. Persico, supra.*

In *United States v. Persico, supra,* a case heavily relied upon by the government, this court of appeals stated:

> "Appellants moved for a mistrial on the ground that the publicity prejudiced the jury, making it impossible for them to receive a fair trial. The trial judge took prompt and effective corrective action. See *United States v. Agueci,* 310 F.2d 817, 832 (2d Cir. 1962), *cert. denied, Guippone v. United States,* 372 U.S. 959, 83 S. Ct. 1013, 10 L.Ed.2d 11 (1963). He held a separate voir dire of each juror, frankly and candidly discussing the problems caused by the publicity. He correctly isolated the reference to the Cosa Nostra as the most potentially prejudicial aspect of the publicity and placed that element in its proper perspective by instructing each juror that it was completely irrelevant to the case."

In the instant case, however, the district court inquired only in a general fashion as to whether the jurors remained unaffected despite their exposure to the article. This conclusion is best exemplified by the following chart.

**The Voir Dire in**
***United States v. Ostrer***

For example, the voir dire of Jurors No. 4 and No. 8.

THE COURT: Sir, would you feel more comfortable doing it inside? If you would, I will go inside.

JUROR NO. 4: No.

THE COURT: All right. Did you read an article about this case in the Post?

JUROR NO. 4: Yes.

THE COURT: Do you think that that article would influence you in any way, sir?

JUROR NO. 4: No, I don't think so.

THE COURT: You recall when you were being selected, I told you you had to decide the case on what's going on in the courtroom, and not on anything else. Do you think you'd have any difficulty just because you read that article?

**The Voir Dire in**
***United States v. Persico***
**425 F.2d 1380, n.8**

For example, the voir dire of juror Charles Cohen went as follows:

THE COURT: Mr. Cohen, we are quite concerned about whether or not the newspaper, radio and television publicity that our case has received might have had some affect [sic] on the Jury's attitude towards the case, and I do want to ask some questions about that.

Did you have a chance, Mr. Cohen, to read any of the newspaper articles or to hear any of the radio or television material?

MR. COHEN: Yes, sir, I did.

THE COURT: Did you see the Daily News article?

MR. COHEN: Yes, I did.

THE COURT: I think that had the completest material.

MR. COHEN: I did.

JUROR NO. 4: No. I would like to say yes, but I won't.

THE COURT: You'd like to say yes? You mean you'd like to say yes and be rid of it and of jury duty, is that what you mean?

JUROR NO. 4: Right, right, but I wouldn't be honest.

THE COURT: All right. That's fair enough. That is all we want. Thank you, sir.

May we have the next person come out, please? (Juror No. 4 left the courtroom)

* * *

(Juror No. 8 entered the courtroom)

THE COURT: Tell me ma'am, did you read an article in the Post about this case?

JUROR NO. 8: Yes.

THE COURT: Did you read the whole thing?

THE COURT: Did you see the Times article?

MR. COHEN: No.

THE COURT: Now, has there been any discussion of the articles and of the radio and television material in the Jury room?

MR. COHEN: I wouldn't say exactly discussion, there might have been a mention that this person read it, someone else said they bought the paper and tore it off the front page, that they didn't want to go any further, and that was about the general extent.

THE COURT: Was there any talk about the pictures that were in the Daily News?

THE WITNESS: There was one mention of your picture.

THE COURT: I am never going to live this down.

Mr. Cohen, as you know, this case is about one thing and one thing only, and that is this:

JUROR NO. 8: I took a quick glance while I was working in the stockroom.

MR. SHARGEL: I'm sorry, I didn't hear that.

THE COURT: "I took a quick glance while I was working in the stockroom."

Do you think that that would in any way influence you in connection with this case?

JUROR NO. 8: No.

THE COURT: All right. Remember I said at the beginning I wanted you to try this case solely upon the facts as they came out here. Do you think that article in any way, shape, manner or form, would influence you?

JUROR NO. 8: No.

THE COURT: No? All right, that is fair enough.

Whether or not the defendants or some of them did or did not obstruct the movement in interstate commerce of the Acres [sic] truck by robbery, or whether one or more of them conspired with the others about that.

It is not about anything else.

Now, if any effort had been made to introduce into this Courtroom here testimony about Cosa Nostra, it would have been excluded because it has absolutely nothing to do with whether or not these defendants interfered with that truck shipment. Just because that couldn't be brought in against them, for the same reason these men cannot defend themselves against it, they can't come in and try to present the testimony to negate this at all.

As a matter of fact there isn't any such crime as Cosa Nostra, you can't be indicted for Cosa Nostra in any Court anywhere, and so these men have never had a chance to

meet that charge anywhere, and they never will be able to come into a Court and blast it out of the water.

It is a smear and it pursues them and there is nothing they can do about it, it is just talk and they can't meet it no place, and they can't even meet it here today because it has nothing to do with this case.

Nevertheless, there it is, it has been said.

Now what we have to try to figure out is whether or not the fact that it has been said and the way it has been said and that it comes inevitably to the notice of you Jurors means we are in trouble in assuring them the fair trial that each one of us wants to see that they get, and the Jurors most of all.

So what I want to ask you is whether notwithstanding the publicity, you can say whether or not you are satisfied about your capacity to listen to the evidence, no other talk, and

decide this case fairly to them and to the Government without reference to this publicity.

Do you think you are up to that or is that something that you would say is beyond the compass of the human mind?

MR. COHEN: No, I would say that I would be able to continue.

THE COURT: Here is one way of putting it up to you, it calls upon you to perform a kind of an imaginative feat that is pretty unreal but I wish you would make the effort:

Put yourself in the position of one of the defendants here, think of him as being on trial before this Jury, and then look into your own mind with his eyes and tell me whether or not you think that your mind, looked at with the eyes of ıe of the defendants, would appear to him to be the mind of the man that he wants to have stay on his Jury:

Now, tested by that standard, what is your answer, would you be able to continue fairly to both sides in this case?

MR. COHEN: That would be my answer, to continue and be fair by what I hear.

THE COURT: Thank you, sir.

Now, when you go back to the Jury Room, Mr. Cohen, I would ask you not to discuss our interview with any of the other Jurors because we want to get their individual reaction.

MR. COHEN: I understand.

THE COURT: And responses.

MR. COHEN: I understand, yes, sir.

THE COURT: Thank you, sir.

Thus, in the instant case, the district court failed to "frankly and candidly discuss the problems caused by the publicity." It failed to "correctly isolate the references to organized crime as the most potentially prejudicial aspect of the publicity and failed to place that element in its proper perspective by instructing each juror that it was completely irrelevant to the case."

An approval of the inquiry made by the district court would clearly be in direct conflict with the prior decision of the Second Circuit in *United States v. Persico, supra.*

## CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Second Circuit Court of Appeals.

Respectfully submitted,

BARRY M. FALLICK
*Attorney for Petitioner*

# APPENDIX

## OPINION OF THE UNITED STATES COURT OF APPEALS DATED FEBRUARY 18, 1981

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 18th day of February, One Thousand Nine Hundred and Eighty-one.

PRESENT:

HON. J. EDWARD LUMBARD, Circuit Judge
HON. ELLSWORTH A. VAN GRAAFEILAND, Circuit Judge
HON. AMALYA L. KEARSE, Circuit Judge

80-1286
80-1469

Filed Feb. 18, 1981
A. Daniel Fusaro, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LOUIS C. OSTRER and SEYMOUR GREENFIELD,

Defendants-Appellants.

*Opinion*

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appellants Louis C. Ostrer and Seymour Greenfield appeal from judgments of conviction entered in the United States District Court for the Southern District of New York (Duffy, J.) after a six-week jury trial. The jury found Ostrer guilty on all seven counts of an indictment charging him with conspiracy to evade, and evading, payment of approximately $6.8 million in personal income taxes, conspiracy to embezzle and actual embezzlement of $1,232,000 from the welfare and pension funds of Teamsters Local 918, transporting $75,000 of the embezzled funds in interstate commerce, and one count of racketeering. Greenfield was convicted of conspiracy to evade payment of income taxes.

Appellant Ostrer's principal claims of error involve the fairness of a post-trial suppression hearing and the correctness of the district court's charge on the issue of agency. We find no merit in either.

Appellant failed to make even a *prima facie* showing that any tainted evidence was introduced at the trial. *See Alderman v. United States,* 394 U.S. 165, 183 (1969). The IRS was authorized to make lawful inspections of Ostrer's business records and the fact that some of them may have been seized by state officials prior to the inspection does not taint what would otherwise have been a legal inspection. Because the inspection was not unlawful, the district court did not err in refusing to further prolong the suppression hearing.

*Opinion*

Ostrer argues that the district court erred as a matter of law in charging that if the jury found that Ostrer "was an authorized agent of Foundation Life who received funds from Local 918 Pension and Welfare Funds in that capacity, it is still possible for him to have embezzled funds from Local 918." We are not prepared, however, to consider this portion of the charge in a vacuum. The district court also instructed the jury that, if it found that Ostrer "did turn the money in question over to Foundation Life, there can be no embezzlement from Local 918 as charged, even if the money was later used by Ostrer for his own personal benefit." Ostrer was convicted under 18 U.S.C. §664, which makes it unlawful for a person to convert "to his own use or to the use of another" any of the assets of an employee welfare benefit or pension benefit plan. Ostrer was entrusted with welfare and pension funds. If he disposed of these funds without right, as if they were his own, he converted them to his own use in violation of the statute. *United States v. Santiago*, 528 F.2d 1130, 1135 (2d Cir.), *cert. denied*, 425 U.S. 972 (1976). He cannot escape criminal responsibility by claiming that he was acting as an agent for the insurance company.

Appellants' remaining contentions merit little discussion. The Government established a sufficient pattern of racketeering activity to support Ostrer's conviction under 18 U.S.C. §1961(5). The newspaper article contained little that had not already been discussed in the courtroom and the district court's inquiry of the jurors who had read it was prompt and searching. The court did not err in refusing to grant appellants' motion for a mistrial. We find no prejudicially erroneous statements in the prosecutor's summation.

*Opinion*

Affirmed.

s/ J. Edward Lumbard
Hon. J. Edward Lumbard

s/ Ellsworth A. Van Graafeiland
Hon. Ellsworth A. Van Graafeiland

s/ Amalya L. Kearse
Hon. Amalya L. Kearse

## ORDER OF THE UNITED STATES COURT OF APPEALS DENYING THE PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of April, one thousand nine hundred and eighty-one.

Present:

HON. ELLSWORTH A. VAN GRAAFEILAND

HON. J. EDWARD LUMBARD

HON. AMALYA L. KEARSE

Circuit Judges.

80-1286
80-1469

Filed Apr. 2, 1981
A. Daniel Fusaro, Clerk

United States of America,

Plaintiff-Appellee,

v.

Louis C. Ostrer and Seymour Greenfield,

Defendants-Appellants.

*Order*

A petition for a rehearing having been filed herein by counsel for the defendants-appellants Louis C. Ostrer and Seymour Greenfield

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/ A. Daniel Fusaro
Clerk

Office-Supreme Court, U.S.
FILED
AUG 6 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2039

# In the Supreme Court of the United States

OCTOBER TERM, 1980

---

LOUIS C. OSTRER and SEYMOUR GREENFIELD,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

---

LAWRENCE G. WALLACE
*Acting Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## TABLE OF AUTHORITIES


| Cases: | Page |
|---|---|
| *Marshall* v. *United States*, 360 U.S. 310 | 5 |
| *Murphy* v. *Florida*, 421 U.S. 794 | 6 |
| *Rosales-Lopez* v. *United States*, No. 79-6624 (Apr. 21, 1981) | 5 |
| *United States* v. *Persico*, 425 F.2d 1375, cert. denied, 400 U.S. 869 | 1, 3, 5, 6 |
| *Wisniewski* v. *United States*, 353 U.S. 901 | 6 |
| **Statutes:** | |
| 18 U.S.C. 371 | 2 |
| 18 U.S.C. 664 | 2 |
| 18 U.S.C. 1962(a) | 2 |
| 18 U.S.C. 2314 | 2 |
| 26 U.S.C. 7201 | 2 |

# In the Supreme Court of the United States

OCTOBER TERM, 1980

---

No. 80-2039

LOUIS C. OSTRER and SEYMOUR GREENFIELD,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

---

Petitioners contend that (a) statements contained in a short newspaper article read by certain jurors near the beginning of their trial were so prejudicial as to require the district court to empanel a new jury and (b) the district court's voir dire of the jurors exposed to the allegedly prejudicial article was inadequate under the standard established in *United States* v. *Persico*, 425 F.2d 1375 (2d Cir.), cert. denied, 400 U.S. 869 (1970).

1. Following a six-week jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy to evade payment of $6.8 million of petitioner Ostrer's personal income taxes, in violation of 18 U.S.C. 371; petitioner Ostrer was also convicted of evasion of income taxes (26 U.S.C. 7201), conspiracy to embezzle and embezzlement (18 U.S.C. 371, 664), transportation of embezzled funds (18 U.S.C. 2314), and investing funds derived from a "pattern of racketeering" (18 U.S.C. 1962(a)). Petitioner Ostrer was sentenced to 20 years' imprisonment and a fine of $70,000, and the costs of prosecution were assessed against him; petitioner Greenfield was sentenced to three years' imprisonment and a fine of $10,000 (Pet. App. 2a).

Three days after the trial began, an article appeared in the New York Post entitled "The Man Who Owes $7 Million in Taxes." The article was essentially a summary of remarks made by the prosecutor and petitioner Ostrer in their opening statements.[1] It also referred to Ostrer as having "alleged links to the underworld" and to an attempt by the Manhattan District Attorney's Office "to force Ostrer to testify before a special grand jury about information he had about alleged organized crime, loansharking, extortion and murder" (see petitioners' C.A. Br. App.).

The article appeared on a Friday when the court was not sitting. On the following Monday, the court asked all of the jurors whether they had seen the article. After five jurors responded that they had seen the article (Tr. 158), they were questioned

[1] Ostrer represented himself, but at the court's direction one of his two retained lawyers was always present to advise him.

individually by the court.[2] Each of the jurors unequivocally stated that the article, or so much of it as he had read, would not influence his deliberations. The court then reminded each juror of his obligation to decide the case on the evidence introduced at trial, and each juror, without hesitation, acknowledged that he could do so (Tr. 159-164). The court also instructed the five jurors who had seen the article not to discuss it with any of the remaining jurors (Tr. 158-159).

At the completion of the voir dire, Ostrer moved for a mistrial and Greenfield moved for a severance. Neither of them, however, asked the court to inquire of the jurors any further; nor was there any request for further instructions.

2. The Second Circuit correctly concluded that petitioners were not prejudiced by the newspaper article and that the district court's voir dire was adequate. As the court of appeals noted (Pet. App. 3a), "[t]he newspaper article contained little that had not already been discussed in the courtroom and the district court's inquiry of the jurors who had read it was prompt and searching." In addition, petitioners obscure the fact that most of what was assertedly prejudicial in the newspaper article was "brought out at trial as competent evidence" (*United States* v. *Persico*, *supra*, 425 F.2d at 1380).

*a.* In his opening statement, Ostrer conceded his tax liability (Tr. 52-59). His primary defense to the evasion of payment counts was that he owed large sums of money to "loansharks" and was therefore unable to pay the taxes he owed. He explained to the

---

[2] "Tr." references are to the trial transcript; "DX" refers to defense exhibits at trial.

jury that he would prove that he had to pay "thousands of dollars to private money lenders" (Tr. 50). Consistent with his opening statement, during his direct testimony Ostrer referred to those lenders, as had his attorneys in the pretrial proceedings, as "loansharks" and testified repeatedly that he owed large sums of money to "loansharks" and "shylocks" (Tr. 2128, 2132, 2186, 2190). Similarly, in his examination of other witnesses, Ostrer elicited, or attempted to elicit, testimony concerning his dealings with loansharks (Tr. 1132, 1168, 1693, 2683). Ostrer also testified that he had received beatings from a number of the loansharks to whom he owed money (Tr. 2188-2190).

Ostrer claimed to be heavily indebted to numerous attorneys who had unsuccessfully represented him in several criminal cases. At one point, he boasted that one of those convictions was for stock fraud "with a man * * * [named] Johnny Dio, an infamous character that had an unsavory background" (Tr. 2166-2167). Ostrer told the jury that he had gone to jail for three years as a result of that conviction and explained that he had used numerous lawyers fighting the conviction (Tr. 2175). Similarly, in an effort to explain why he had been riding in a chauffeur-driven limousine at a time when he claimed to be in difficult financial straits, Ostrer testified that such a luxury was necessary after he had been called as a grand jury witness by the New York County District Attorney and had been advised that he "was earmarked for mutilation by unsavory persons" (Tr. 2278-2279).

Ostrer unsuccessfully tried to introduce additional evidence of his ties to organized crime. For example, although not permitted to do so on relevancy and

hearsay grounds, Ostrer sought to introduce an Internal Revenue Service investigative report that showed that he was heavily indebted to organized crime families (Proposed DX 138; Tr. 2106-2107). Similarly, he sought to testify that he was considered for the FBI's "Top Echelon Criminal Informant Program" in 1967 (Tr. 2100).

*b.* Petitioners now claim (Pet. 6-7) that they were prejudiced by the brief references in the article to Ostrer's "alleged links to the underworld" and the Manhattan District Attorney's apparently unsuccessful effort to force Ostrer to give information about "alleged organized crime, loansharking, extortion and murder." In light of Ostrer's chosen defense strategy, that claim is on its face insubstantial. The prejudice is claimed to arise from the suggestion that Ostrer and, indirectly, Greenfield (see *id.* at 6 n.1) had "links to the underworld" or "organized crime" activity. This "suggestion," of course, had already been made by Ostrer in his opening statement and was emphasized by him during the course of the six-week trial. Thus, unlike *Marshall* v. *United States*, 360 U.S. 310 (1959), and the other cases cited by petitioners, the newspaper article in this case introduced nothing that the jurors did not already know or that they would not have learned during the trial.

The impact of assertedly prejudicial publicity must be assessed in light of the facts in each case, and the trial judge necessarily has broad discretion in determining whether prejudice has resulted, and, if so, what remedy is most appropriate. See, *e.g.*, *Marshall* v. *United States*, *supra*, 360 U.S. at 312; *United States* v. *Persico*, *supra*, 425 F.2d at 1382; see generally *Rosales-Lopez* v. *United States*, No. 79-6624 (Apr. 21, 1981), slip op. 5-6. The voir dire

in the instant case did not reveal any hostility against petitioners sufficient to suggest partiality that could not be set aside. See *Murphy* v. *Florida*, 421 U.S. 794, 800 (1975). To assert that the jurors, deliberating some six weeks after the article's appearance, even remembered the article, let alone relied on it in lieu of the trial evidence in convicting petitioners, is baseless speculation that does not even approach the requisite showing of prejudice necessary to support reversal of the district court's denial of the motions for mistrial and severance. Compare *United States* v. *Persico*, *supra*, 425 F.2d at 1380, 1382.[3] Juror assurances of impartiality should not be lightly dismissed, particularly when their exposure to the defendants' past crimes and associations comes from the defendants or their counsel. See *Murphy* v. *Florida*, *supra*, 421 U.S. at 800 n.3.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

LAWRENCE G. WALLACE
*Acting Solicitor General*

AUGUST 1981

---

[3] Although the Second Circuit saw no inconsistency between the decision in this case and *Persico* (see Pet. App. 5a-6a), to the extent that any such inconsistency exists, it should be resolved by the court of appeals rather than by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 351984 583